BRIEF IN SUPPORT OF PETITION.

JURISDICTION INVOKED.

The Judgment of the Court of Appeals for the Sixth Circuit, affirming the judgment below was entered June 6, 1944. The rehearing was denied July 17, 1944. The Judgment of this Court is invoked on the Judicial Section 240 (a) 28 U. S. C. A. Sec. 347 (a) as amended by the act of Feb. 13, 1925. The mandate was stayed on August 21, 1944, until the final disposition of this Petition.

OPINIONS BELOW.

The opinion of the District Court is not reported and appears in this record on page 94. The opinion of the Court of Appeals appears in the Record on page 102 and was published (142 F. (2) 991).

A STATEMENT OF THE CASE.

A fund of $550,000 was recovered by the compromise of a plenary suit filed by the Cleveland Terminals Building Company (sometimes hereinafter called "Debtor") against George A. Ball and the Ball Foundation (hereinafter designated as "Ball") in the District Court at Indianapolis, Indiana. The action was for profits received in dividends paid by "Midamerica" to Ball (its principal stockholder) which it realized from its purchase of the collateral at the Morgan sale held September 30, 1935, described in the "Howe" and in the "Gochenour" suits, and set forth in *Gouchenour* v. *Cleveland Terminals Building Company* (118 Fed. (2d) 89). There the

District Court was directed to appoint an Examiner to study the causes of action and to instruct the Debtor to institute a plenary action against Ball, or to permit Petitioners to sue in its name.

While Respondents were negotiating with Petitioners on a form of an order they obtained an *ex parte* order on May 1, 1941, to file the suit and they were appointed as Special Counsel (R. 39-40). The suit resulted in the compromise of $550,000 on January 9, 1942 (eight (8) months thereafter), to which Petitioners consented.

Respondents, Leckie, Fogg and Sharp filed an application for an allowance of $75,000 for their compensation and $182.12 for expenses and $3,500 for their local counsel at Indianapolis (R. 1-19). Petitioners filed an application for the reimbursement of $1,160.62 for expenses and the allowance of $25,000 as compensation (R. 19-24). The matter was heard by a Special Master.

Respondent Sharp made a general statement as to their services and referred to the petition and schedule.

Petitioner Abrams testified in support of petitioners' claim (R. 47-53). At the conclusion of this hearing, counsel for the Securities Exchange Commission recommended a maximum allowance to petitioners of $5,000 and their expenses (R. 58).

Petitioner Gochenour,* a creditor, filed objection to the reasonableness of the fees requested by respondent (R. 78-79). The Master rendered his report (R. 64) on April 15, 1943, recommending the allowance of $65,000 to Special Counsel and $3,000 to their local counsel and their expenses, and "nothing" to the petitioners (R. 73).

* Unless otherwise indicated the word petitioners refers to the other petitioners who were the attorneys for Petitioner Gochenour.

Objections were duly filed by Petitioners to the Master's report supported by a brief (R. 74-84). A hearing was had before the Court on October 26, 1943 (R. 88). On November 9, 1943, the court filed a memorandum opinion (R. 94) and on November 13, 1943, entered its order (R. 99) allowing $65,000 to its appointee, $3,000 to their local counsel and "nothing" to petitioners.

The Evidence.

The evidence of Respondents consists of the "statement" of Mr. Sharp (R. 25-33), and the petition and schedule attached thereto. Their services, according to the schedule consumed 1600 hours (R. 33), 400 of which was performed from November 22, 1938, to April 30, 1941, prior to their appointment (R. 7-19). A large part of the services was devoted in opposition to the Howe suit, which was commenced by petitioners to protect the estate and to recover the funds.

The evidence of Petitioners was that of Mr. Abrams (R. 47-56). His testimony tended to show that the $550,000 recovery resulted from his efforts and study of the Senate Investigation Committee records and files in Washington, D. C., when these records were not yet known or available to the public. This was the basis for his objections to the claims of "Midamerica" which were made available to all parties, pursuant to the Master's request, when he prepared Exhibit "H" which was filed October 14, 1937. This Exhibit (R. 60-64) disclosed the facts concerning the sale of the collateral to "Midamerica" and the arrangements to buy the collateral for the fiduciaries, the Van Sweringens. The existence of the cause of action did not occur to him when he filed the objections to the claims of "Midamerica", and he conceived the existence of such action, in the middle of August, 1939.

Petitioners filed the "Howe" suit on September 11, 1939, and sought leave to join the Debtor as party thereto. The Debtor stated that it did not think any recovery could be had but if the creditors wanted to pursue their remedy it had no objection, provided it be made a nominal party only (R. 49-50). Thereafter Petitioners filed the action against Ball. Both suits were the subject of the appeal which resulted in the reversal of a part of the order on March 3, 1941, with directions to the District Court to consider the suits as petitions to instruct the Subsidiary-Debtor to sue or to permit petitioners to sue in its name (118 F. (2) 89). While negotiations were pending for the entry of the order on the mandate, and, without any notice (R. 51), Respondents, Leckie, Fogg and Sharp obtained their appointment as Special Counsel.

The appointees of the Court filed in the name of the Debtor 31 exhibits (R. 39-47) in their efforts to oppose the compensation of Petitioners, including newspaper clippings (Ex. 9) which were received over objections.

The Master's Report.

In passing on the petition of respondents, the appointees of the court, the Master confined his report to two pages (R. 65-66). He found : (1) that the asset recovered was not an "apparent" or "known asset" and it was developed by the applicants from a more or less doubtful inchoateness to a cash recovery of $550,000; (2) that by "careful" and "progressive" methods, the "first concrete step" was the "successful attack" by the applicants "upon claims" filed by Midamerica; (3) that with the "first step successful" a strong foundation was laid for the basis of the recovery from Ball; (4) that with the exception of a few dates subsequent to May 27, 1940, Special Counsel have performed services "directly" in connection with the recovery of this asset, and (5) that

it appears "superfluous" to state that services rendered in the successful recovery of assets should not be compensated as routine or administrative services and that $65,000 was therefore fair and proper.

The Master's report on petitioners' application takes up seven typewritten pages (R. 67-72). The Master found: (1) that the testimony of petitioner Abrams that the idea of the cause of action was conceived by him was untrue; (2) that the statement in the petition that petitioners ascertained that it was not the desire of the Debtor or other creditors to spend money for the prosecution of the suit and that petitioners for the purpose of protecting the asset, filed the complaint in Indiana, is untrue; (3) that petitioners dismissed the Howe suit, and therefore, the Howe suit was unproductive and petitioners were not entitled to compensation (R. 67-69).

The Master further found: (4) that petitioners based their claim for compensation on the reversal of the order of the District Court in 118 F. (2d) 89, but the record does not bear out this statement; (5) that Debtor's Exhibits 19 and 20 conclusively show that at the time when Abrams appeared before the Court of Appeals that the Judge had theretofore looked into the various matters and things alleged as to the officers and directors of Debtor and had "made findings" or had "taken action" with regard to them;* (6) that when Abrams testified that he conceived the cause of action against Ball because of the investigation that he made he, the Master, suggested that he also had been receiving reports from the Senate Committee, and Abrams answered that he had examined the

* It is evident that the ire of the Master was aroused by the criticism of his report in the opinion which reversed the order of the court confirming his report on the ground of abuse of discretion, and he, therefore, attempted to justify his report and the acts of the judge by the assertion that the judge had heretofore looked into the various matters, which is not supported by the exhibits to which he referred.

Master's files and found no such reports. Only after the Master, in order to protect the record, made a statement as to his receipt of the reports did the witness "retire to the position that it was probably the results of his correspondence with Senator Wheeler that a person came to see "the Master" (R. 70-72). The Master commented (R. 72) on the recommendation of the Securities Exchange Commission which recommended a maximum of $5,000 and disagreed with its recommendation. He concluded that the services did not bring any results; that volunteers cannot receive compensation unless their services were productive. The Master recommended the denial of the expenses and any compensation (R. 73).

The Objections.

The objections to the Master's report (R. 74-84) were: (1) to his recommendation for the denial of any compensation and expenses to Petitioners, and the recommendation to allow $65,000 to the Respondents.

The first objection was to the failure of the Master to find: (a) that the first step leading to the recovery of the fund was the filing of the objections by Petitioners in August, 1937, to the claims of Midamerica, and the filing of Exhibit "H" on October 14, 1937, which disclosed all of the material facts upon which the cause of action was founded; (b) the facts which Petitioners disclosed in the trial against the claim of J. P. Morgan & Company; (c) that Respondents availed themselves of the theories and facts developed by Petitioners which led to the recovery of the $550,000 fund; (d) that the suit against Ball was the direct result of the appeal in which the court rendered its opinion on March 3, 1941; (e) only after the opinion which directed the court to either instruct the Debtor to sue or to permit the Petitioners to

sue in its name was the suit filed; (f) that on April 30, 1941, Petitioners filed their petition in the District Court for the appointment of the Examiner under the mandate of the court and while they were negotiating with Respondents with reference to the form of the order, they appeared on May 1, 1941, without notice, and procured the authority to file the suit and obtained their appointment; (g) that the order on the mandate expressly stated that this part was eliminated from its order because of the previous order which authorized the filing of the suit against Ball; (h) that the suit against Ball did not result from the order which dismissed the application for instructions; (i) the contention that Respondents filed the Ball suit after the final determination by the court of the Midamerica claims is contradicted by the record as the suit was filed before the court disposed of the petition for rehearing; (j) that Petitioners together with Respondents were entitled to one fee for the recovery of the $550,000 to be divided proportionately among them, bearing in mind that Special Counsel were not employed on a contingent basis and that Petitioners performed their services on a contingent basis; (k) the theories and ideas as to the suit against Ball, originated with Petitioners and they produced the cause of action which led to the recovery; and (l) that from the total fees recovered Petitioners were entitled to $25,000 and their expenses (R. 74-77).

The second objection to the Master's report was, that the Master misconceived the facts and erred in his application of the law; that his reasonings are founded on distorted quotations from the petition and the evidence and his report is barren of any findings and was purposely designed to build up the services of the appointees of court and to minimize the services of Petitioners and a

reading of his report and his ruling on the evidence leads to the irresistible conclusion that he was biased (R. 77).

The third objection was to the conclusions of the Master in respect to Respondents' claim for services performed from November 22, 1938 to April 30, 1941, on the ground: (a) that no evidence was offered in support of the schedule; (b) no action was taken by them against Midamerica; the trust doctrine against Midamerica was never advanced by them and their Ball suit was not founded on such theory; (c) after the filing of the Howe suit against Midamerica, Respondents filed an answer on September 27, 1939, which tends to contradict the statement of November 22, 1938; (d) it appears from their schedule that they considered a cause of action against Midamerica on the theory that it was trustee for the Debtor but they never advanced such a theory in any of their pleadings, and (e) the fact that they never sued Midamerica and they did not join in the "Howe" suit refutes their schedule (R. 77).

The fourth objection was (R. 78), to the conclusion that inasmuch as the "Howe" and the "Gochenour" suits were unproductive, Petitioners were not entitled to compensation. This conclusion was irreconcilable with Exhibits 19 and 20 on which it is based. The fifth objection was (R. 78) that the recommendation that the allowance of $65,000 to Leckie, Fogg and Sharp who were appointed on May 1, 1941, and the recommendation to deny any compensation to petitioners was not based on any facts or on any competent evidence. The sixth objection was (R. 78) to the statement that Petitioners did not object to the compensation of Leckie, Fogg and Sharp, and is contradicted by the record of October 30, 1942, and by the written objections which were filed and set out in these objections.

The seventh objection was (R. 79) to the statement that with the exception of a few dates the services of Respondents were "entered directly in connection with the recovery of the assets." This is contradicted by their schedule showing: (a) that they devoted a great deal of time before their appointment to the Howe suit; (b) the recommendation to compensate them for the services in connection with the Howe suit can only be reconciled on the theory that the Howe suit was beneficial; (c) the recommendation to pay $65,000 to Respondents for services rendered prior to their appointment in connection with the actions taken by the Petitioners must be based on the theory that the suits were beneficial to the recovery of the fund; (d) the recommendation to allow them $65,000 in connection with their services concerning the cause of action conceived by Petitioners must lead to the irresistible conclusion that Petitioners' services produced benefits to the estate.

The eighth objection was (R. 80) to the finding that Respondents acted under the orders of the court, which finding is contradicted by the record that they performed services prior to May 1, 1941, without such orders. There is no finding or determination as to the fair and reasonable value of the services prior to their appointment, and subsequent to their appointment.

The ninth objection was (R. 80) to the statement of the Master that the asset was not an "apparent" or "known asset" and was "developed" by Respondents and that this came about by careful and progressive methods, the "first concrete step" being their successful attack upon the claims of Midamerica and with the first step successful a strong foundation was laid for the basis of the recovery from the Ball interests. This is contrary

to the undenied proof showing: (a) that the first step was taken by Petitioners in filing their objections to the claim of Midamerica; (b) that the Master's own order of October 25, 1938, states that Respondents have "substantially" adopted the objections of the Petitioners; (c) that the facts which formed the basis for the claim against Ball were compiled, analyzed and submitted by Petitioners as shown by Exhibit "H" filed of record October 14, 1937; (d) the Master's statement that the pertinent facts were known to him cannot be reconciled with the statemest that the asset recovered was not known or apparent and was developed by Respondents; (e) he failed to consider Exhibit "H" which made all the facts available to all parties.

The tenth objection was (R. 81) that there was no factual finding for the recommendation to allow $65,000 to Respondents and the denial of any compensation to Petitioners. The eleventh objection was (R. 81) to the statement of the Master that it appeared clear from the record that Petitioners had no cause of action against Midamerica and dismissed the action. This statement is based on a distortion of the record and is contradicted by the record. The twelfth objection was (R. 82) to the statement of the Master that Petitioners did not conceive the cause of action but that Respondents conceived it.

The thirteenth objection was (R. 82) to the statement of the Master that because Petitioners filed their suit in Indiana on October 11, 1939, they could not have learned the wishes of the Debtor or the creditors at that date because the meeting before the Master was scheduled for the next day: (a) the creditors filed memorandums objecting to these suits before the meeting; (b) while the creditors stated their position on October 12, 1939, that

they opposed the spending of $25,000 of the estate money in a suit against Ball, there is nothing in the record to refute the testimony that Petitioners received the information as to their position prior to the filing of the Ball suit and the Master had no right to base his conclusions on unfounded assumptions; (c) the petition for instructions which was filed by Respondents made no recommendation that action be taken and it appears therefrom that it was filed to show a superficial effort to protect the estate and it was not filed with any real desire to protect the creditors.

The fourteenth objection was (R. 82) to the statement of the Master that the allegations in the petition that the court reversed the order of the District Court is untrue, which is contradicted by the order of the District Court which was introduced in evidence as Debtor's Exhibit 16. The fifteenth objection was (R. 82) to the statement that the Master, as Examiner, made his examination and report to the effect that no benefit accrued to the estate from the Howe and Gochenour suits and recommended that an order be entered permitting the petitioners to dismiss the Howe suit. This is contradicted by Exhibits 19 and 20 to which he refers. The sixteenth objection was (R. 83) to the statement concerning the testimony of Abrams which showed that the Master was a partisan and not impartial. The seventeenth objection was (R. 83) that it was the duty of the Master to sustain the objections to hearing separately the question of fees from the question of the allocation of the fund. The eighteenth objection (R. 83) was that the Master erred in rendering his report on incompetent evidence, in receiving statements in lieu of evidence. The nineteenth objection was that the report of the Master is contrary to the law and to the evidence and is based on erroneous in-

ferences and deductions. The twentieth objection was that the Special Master improperly received evidence consisting of newspaper clippings and other incompetent evidence, and the twenty-first objection was that it was the duty of the Master to pass upon the fairness and reasonableness of the entire fee for the joint efforts of all attorneys in bringing in the $550,000 fund and to apportion such fees among Petitioners and Respondents (R. 84).

The Ruling of the Judge.

The District Court overruled all objections, allowed $65,000 to its appointees and denied any compensation to Petitioners. Its reasons appear in its memorandum of November 9, 1943 (R. 94-99).

The District Judge did not agree with the Master that Petitioners were not entitled to compensation on the ground of being volunteers (R. 97) but sustained the report because of his statement that their services did not benefit the estate. The Judge gave full credit for the recovery of the funds to his Appointees and justified the allowance of $65,000.00 on the ground (R. 99) that it was only 12% of the amount recovered, although they were not appointed on a contingent basis.

The Opinion of the Court of Appeals.

The Court of Appeals disagreed with the Master and with the Judge on the question whether the cause of action originated from the Petitioners, but on the contrary stated in its opinion (R. 104), that "Abrams made a study of the facts" and "epitomized the evidence" and used the facts as a basis for the objections to the claims (which the Master credited to the Respondents when he stated that they took the first step which led to the re-

covery of the fund). Contrary to the findings of the Master (R. 65) that the first step leading to the recovery was taken by the Appointees of the Court when they filed their objections to the claims and to the statement of the Judge that his Appointees developed all of the facts and theories which lead to the recovery (R. 96-97), the Court of Appeals stated in its opinion (R. 104) that "Abrams prepared a synopsis of the facts" concerning the sale of the collateral, which he gave to all attorneys of record concerning the purchase of Midamerica, which was the basis for the cause of action on which the $550,000.00 was recovered. The Court of Appeals held that no matter what benefits Petitioners contributed to the recovery of the fund, they were not entitled to compensation because of their failure to comply with General Order 44 (R. 109). It approved the allowance of the $65,000.00 to the Appointees of the Court (R. 110) on the ground that under Rule 52, it was required to accept the findings of the Court as correct unless "clearly erroneous." While it held that General Order 44 could not be "by-passed" by Petitioners who represented "creditors" it by-passed the order as to Respondents who claimed to have represented the "debtor in possession" from November 28, 1938, to May 1, 1941, prior to the appointments.

SPECIFICATION OF ERRORS.

1. The Court of Appeals erred in sustaining the orders overruling the objections to the allowance of $65,000.00 to the appointees of the Court because:

(a) They were appointed May 1, 1941, and it was improper to allow them compensation for alleged services performed prior to their appointment.

(b) Appointees of a Court who are not appointed on a contingent basis may not be allowed compensation on a percentage basis.

(c) There were no basic findings in the Master's Report to justify the compensation, and the Master failed to distinguish between the services performed prior to May 1, 1941, and thereafter.

2. The order allowing the $65,000.00 is not supported by basic findings, and is based on erroneous legal propositions:

(a) In applying the test that its appointees were entitled to compensation on a percentage basis.

(b) In failing to comply with Rule 52(a) when the Master's report lacked basic findings.

(c) In construing its previous order appointing Leckie & Fogg as supervisors to have constituted an appointment to sue Ball.

3. The order allowing $65,000.00 to Respondents is unsupported by any competent evidence, and it was the duty of the Court of Appeals to pass on the admissibility of the evidence.

4. The Court of Appeals erred in not ordering that the objections to the Master's Report be sustained and to find and to hold that the $550,000.00 fund was recovered as a result of the services performed by the Petitioners up to May 1, 1941, and of the services performed by the Respondents thereafter. It was its duty to direct the Trial Judge to reject the Master's Report, to sustain the objections, and to allow fair and reasonable fees to be divided among the Petitioners and the Respondents upon findings as to the value of their respective services.

5. The findings of the Master and the conclusions of the Court that Petitioners did not contribute anything to the recovery of the fund is contrary to the undisputed facts.

6. The Court of Appeals erred in not directing the Judge to sustain the objections to the Master's Report that the fund was recovered as a result of the services performed by Petitioners in commencing the Howe and the Gochenour suits leading up to the decision of March 3, 1941, which compelled the filing of the action by Respondents and which brought the recovery of the fund.

7. It was the duty of the District Court to sustain the objection on the ground that the Master was biased, and to make the proper findings the Court of Appeals erred in not reversing the order above.

8. The Master and the court clearly erred when they received in evidence over objections the newspaper clippings being Debtor's Exhibit 9 and the decree is based on the incompetent evidence, and it was the duty of the Court of Appeals to pass on the errors assigned on this point which it failed to do.

9. The Master improperly refused to permit the cross-examination of the witness Sharp, and erred in rejecting competent evidence when he told the witness Sharp not to answer some of the questions. It was the duty of the court to sustain the objections to his report, and it erred in not doing so, and it was the duty of the Court of Appeals to reverse the order.

10. Petitioners also adopt by reference all of their objections which appear in the printed record at pages 74 to 84.

SUMMARY OF ARGUMENT.

I.

It was the duty of the Court of Appeals to reverse the order allowing the $65,000.00 to the respondents and denying any compensation to the petitioners and the affirmance of the order is in conflict with decisions of other Circuits and with the decisions of this Court.

(a) The services of Leckie, Fogg and Sharp prior to May 1, 1941, were voluntarily rendered and no compensation was allowable for such services without compliance with General Order No. 44.

II.

The basic findings for the allowance of the $65,000.00 were absent and the Court of Appeals clearly misapplied Rule 52 when it affirmed the judgment below.

(a) The District Judge had no personal knowledge of the services performed by his Appointees.

(b) The schedule of the services of the appointees of the Court runs counter to the findings and conclusions of the Master and of the District Judge and it was the duty of the Court of Appeals to reverse his order.

(1) There was no showing why it was necessary to have three attorneys.

(2) The facts and the theories were taken from petitioners' complaints.

(c) Appointees of a court whose compensation is not contingent may not be compensated on a percentage basis of the amount recovered and their compensation must be confined to the value of the services rendered, and the finding of the Master which was adopted by the court is based on erroneous legal principles and should have been reversed. The Court of Appeals erred when it applied Rule 52 in the absence of a foundation for the findings.

III.

The recovery of the $550,000 fund was the direct result of the services performed by petitioners in the Howe and Gochenour suits and in the petition for clarification which was permitted to stand as a petition for instructions on the debtor to either sue or to permit petitioners to sue in its name.

(a) The recovery of the fund resulted from petitioners' efforts.

(b) The record contradicts the statement of the judge.

(c) The rights of the creditors were protected by the petitioners.

(d) The record does not support the timing of the suit by the Judge.

(e) The first step to recover the fund was taken by petitioners.

(f) Petitioners made all facts available to respondents.

IV.

The findings of the Master and the conclusions of the court that petitioners did not contribute anything to the recovery of the fund is contrary to the undisputed facts.

(a) Respondents' evidence showed that they made use of the facts and theories which petitioners made available to them.

(b) The Howe suit in Ohio and the Gochenour suit in Indiana and the appeal resulting in the mandate to appoint an examiner to investigate the causes of action and to direct the subsidiary-debtor to either commence an action in its name or to permit petitioners to proceed with the action in its name resulted in the recovery of the fund and petitioners were entitled to reasonable compensation.

V.

The allowance of compensation for the recovery of funds is governed by rules of equity and is not confined to statutory provisions.

VI.

General Order 44 in bankruptcy was improperly invoked against petitioners who did not claim to represent a trustee, a receiver or a debtor, but represented creditors.

(a) Petitioners performed their services in connection with the reorganization plans and no order was required for such purposes.

(b) No order is necessary when the interest of the trustee is adverse to the interest of the creditors.

VII.

The Court of Appeals failed to examine the foundation for the findings on which it affirmed the order below.

ARGUMENT.

I.

It was the duty of the Court of Appeals to reverse the order allowing the $65,000.00 to the respondents and denying any compensation to the petitioners and the affirmance of the order is in conflict with decisions of other Circuits and with the decisions of this Court.

The District Judge appointed respondents Leckie, Fogg and Sharp as Special Counsel on the day when it entered the *ex parte* order authorizing them to sue Ball on May 1, 1941 (R. 39-40). They were *not "appointees" of the court* as to such action *prior* to that day. Their schedule of services contains over 400 hours for *alleged* services from November 22, 1938, to April 30, 1941, *prior to their appointment* (R. 7-19).

(a) The services of Leckie, Fogg and Sharp prior to May 1, 1941, were voluntarily rendered and no compensation was allowable for such services without compliance with General Order No. 44.

The Seventh objection was (R. 79) to the finding of the Master that the services of respondents were performed "directly in connection with the recovery of this asset", and that such finding was *contradicted* by *their* schedule. The schedule shows (R. 7) that on November 22, 1938, Leckie and Fogg held a "conference" with *themselves* because of the Master's action on the *claims* of Midamerica. Their conference allegedly held with reference to the theory that "Midamerica" acted as "trustee" and on the question whether the Debtor should file suit against

Midamerica. *Neither Leckie nor Fogg had anything to do with claims against Midamerica.*

The order of February 8, 1938, appointing them as "supervisors," on which they relied in the petition (R. 1), expressly provided (R. 6)

> "that said Frederick L. Leckie and Joseph G. Fogg *shall have no duty to exercise any supervision and control over the action the Subsidiary-Debtor may take with respect to claims* now pending in this proceeding or with respect to any plan of reorganization herein."

and they were only authorized to:

> "supervise and direct the *management* of the properties and the operation of the business of the Subsidiary-Debtor as the same shall be conducted by its officers, employees and agents and *to perform such legal services* as may be proper or necessary *in connection therewith.*"

It is clearly obvious from the foregoing that *no authority was granted to them under such order* concerning claims or any action against Midamerica or Ball.

The statement in the opinion (R. 109) that Order 44 "cannot be by-passed" was by-passed by the Judge (R. 96) when he allowed compensation to his subsequent Appointees for alleged services prior to their appointment in the absence of any petition, and order as required by General Order 44.

The Judge stated in his opinion that Fogg and Leckie were his "appointees" as to the Ball suit when they were appointed "supervisors" (R. 98).* The order appointing them as "supervisors" (R. 6) *expressly relieved them from any duty* and responsibility concerning claims of Midamerica and their duties were *circumscribed to supervision of management.* This order is *irreconcilable* with

* Respondents could not have received their appointment to prosecute a cause of action in February, 1938, when, according to their own schedule, the cause of action was first conceived by them in November, 1938.

his opinion. It is irreconcilable with general order 44, which provides:

> "No attorney for * * * Trustee or Debtor in possession shall be appointed, except upon order of the court"

and that no such order shall be entered unless:

> "Upon the verified petition of the * * * debtor in possession"

stating the name of the counsel, *the reason for his selection,* the professional services he is to render, *the necessity for employing counsel* and his connection with any of the parties of interest. This rule was directed against "potential" *evils* as much as against "actual" ones, and the courts are inclined to seize even upon *minor defects* to disallow compensation (*Matter of Shattea,* 51 F. (2) 984; *Jones and Newberry* v. *General Motor Accessories Co.,* 284 U. S. 682).

In the instant case *there was no such petition* filed at any time. Even when the court appointed "Special Counsel" on May 1, 1941, it was not in compliance with this rule, but prior thereto *there was not even an appointment* and the statement of the court that in appointing Leckie and Fogg as "supervisors", it thereby appointed them as special counsel concerning the suit against Ball is contrary to its *own order,* which *limited* the appointment to the "supervision" of the "management".*

Even if respondents had received *ex parte* oral statements from the Judge concerning their future employment, it would not have been a lawful substitute for the prescribed prerequisites under general order 44 (2 Collier on Bankruptcy, 14th Ed., p. 1672). The Court of Appeals completely overlooked the General Order in Bankruptcy

* Petitioner, Gochenour, a creditor of the estate, moved for the appointment of a Trustee for the Debtor because of the adverse interest of its officers and directors, who are also officers and directors of the "Parent". The Court did not appoint a Trustee for the Debtor but appointed Fogg and Leckie as Trustees of the "Parent" and as "supervisors" of the subsidiary, the Debtor.

in passing on the allowance of the respondents while it relied on the order in approving the denial of petitioners' claim to which it was not applicable (*Re Stratton,* 51 F. Supp. 944).

II.

The basic findings for the allowance of the $65,000.00 were absent and the Court of Appeals clearly misapplied Rule 52 when it affirmed the judgment below.

The Judge said in his opinion (R. 99) that this case was not like the ordinary bankruptcy case where the judge seldom has knowledge of the legal services performed, and that he, the Judge, had personal knowledge of the character of the services and of the problems involved.

(a) The District Judge had no personal knowledge of the services performed by his Appointees.

The services concerning the recovery of the fund were *not* performed before the Judge. They were performed *outside* of the court. In the ordinary case the officers of a court in administering the estate perform their services before the judge and he, therefore, is deemed to have personal knowledge. Here, the work consisted of assembling facts, developing theories and embracing them in a complaint which was filed in a *foreign* court. That the services were *not* performed before the judge but were performed in "conferences" between the three *sets* of attorneys, appears from their schedule (R. 7-19). On the most insignificant issues in the case, the Judge abdicated his functions and referred everything to the Special Master. The issue whether to make the debtor a party to the Howe suit which required merely a determination on the pleading, he referred to the Special Master. The issue whether to instruct the debtor to bring the

action, he referred to the Special Master. The issue whether *to set aside his own order* denying leave to make the debtor a party, he referred to the Special Master. All he knew was from the reports which the Master filed containing the schedules.

(b) The schedule of the services of the appointees of the Court runs counter to the findings and conclusions of the Master and of the District Judge and it was the duty of the Court of Appeals to reverse his order.

The schedule of the respondents speaks for itself and is the best evidence against the allowance of the fees. It shows "conferences" between *three* different firms of lawyers, without any explanation why the conferences were necessary, and there was no evidence to explain why one lawyer could not have performed all of the alleged work. From the date of the first alleged conference of November 22, 1938 to August 23, 1939, *nothing was done by them* (R. 7). *Everything was at a standstill.*

On September 11, 1939, petitioners filed the Howe suit against Midamerica and its officers. They served notice on Leckie, Fogg and Sharp that on September 12, 1939, they would apply to the District Court for leave to join the Subsidiary-Debtor as a party. *They indeed became busy from then on according to their schedule.* On that very day when the entire cause of action was completely set forth in the Howe complaint, their schedule sets forth (R. 8) that they held another "research" conference of "6½ hours" on the question "whether to file suit" not only against Ball but *also against Midamerica,* the corporation which they had previously determined *had no assets* and against which they later stated that there was *no opportunity for a recovery.*

This schedule may be responsible for the statement in the opinion (R. 104) that respondents filed a petition for

instructions whether to sue Midamerica, and (R. 105) that the Master reported that respondents "wished to postpone action on the claim against Midamerica". *No such petition was ever presented by them and no such report was ever given by the Master.* It is evident from the opinion that the court *confused* the actions taken against Midamerica by the petitioners with the petition for instruction which respondents filed against Ball. The petition for rehearing pointed out the factual errors (R. 112), but the Court of Appeals denied it without even correcting its opinion on the matters which were contrary to the record.

On September 13, 1939, "8½ hours" were alleged to have been devoted in a "conference" with Kellogg and Sharp who appeared for the *first* time, and the question "whether the Subsidiary-Debtor should file suit against Midamerica" was again discussed and what action should be taken in the Howe suit was also discussed. It was then known to them that Midamerica had no assets as they claimed to have spent many hours on such "researches" previously. *They filed no suit against Midamerica and they acted as volunteers and produced no results.* The time spent on the Howe suit resulted in their answer which they filed on September 27, 1939. This answer consisted of about one printed page and what "researches" were necessary to file such an answer does not appear of record. A cursory examination thereof by the court is invited (R. 49).

The schedule also states (R. 8) that additional "5½ hours" were spent on the *same day* and on September 15, 1939, there was a "conference" *for* 15 *hours on the Howe suit.* A further conference of 8½ *hours* was held on September 16, 1939, on the application for instructions and 5 *additional hours* were consumed when they "dic-

tated" and "revised" the application for instructions. On the *same day* a further "conference" of 9 *hours* concerning the same subject matter is scheduled (R. 9). Another "15-hour" conference was held (R. 9) on September 19, 1939 (on the Howe suit), and an *additional* conference on the same day of 2½ hours relating to the Ball suit. A 9-hour conference was held September 20, 1939, concerning the motion in the Howe suit for leave to make the Debtor a party. A conference of 13½ hours was held on September 21, 1939, on the same subject matter and an additional hour for "research" (R. 9). A "conference" of 6 hours was held September 22, 1939, and another "conference" of 5½ hours is scheduled on September 23, 1939 (R. 10). A conference of 8 hours was held on September 25, 1939, and a further conference of 5¾ hours on the same day. A further conference of 11½ hours was held on September 26, 1939 (R. 10). All of these conferences between themselves related to the same subject matter, the Howe suit—and the alleged "research" concerning the Ball suit.

From all these conferences and researches "*the mountain produced the mouse*", the answer which they filed September 27, 1939 (R. 49), which stated that Subsidiary-Debtor had considered with its counsel the alleged cause of action against Midamerica and was of the opinion that it does not appear to offer sufficient prospect of recovery to justify it incurring any expense; but if the creditors desired to prosecute the suit at their own responsibility it had no objection to being joined as a nominal party, provided no relief is asked against it and no expenses taxed against it.

Not a word is to be found in the answer that they had made any research whether to start a suit, as to the re-

sults of the investigation, and that they considered filing a suit against Ball in Indiana.

Having filed this answer they held another "conference" on September 28, 1939, for 3 hours (R. 10) on the application for instructions and spent an additional 7 hours on September 29, 1939 to "complete" the application for instructions, on which they previously scheduled 13½ hours to a conference where they "dictated" and revised the application (R. 8). They held a further conference of 4 hours on September 30, 1939, concerning such application. The dictation, the revision and the completion of the three-page application consumed 27½ hours. All of this time was spent in preparing an application for instructions which consists of less than three printed pages (Exh. "A", pp. 40-43)*, when all of these facts were set forth in the Howe suit. In their application they stated the suit against Ball "would probably require" that it be instituted in the State of Indiana and that it "entailed practical difficulties of proof" and would involve "the expenditure of a considerable amount of money for expense of litigation". The "search" should have disclosed to them that the proof was simple. Exhibit "H" (R. 60-64), which was filed with the Master on October 14, 1937, contained all of the facts, together with a reference to the exhibits as proofs. *This exhibit was seen by other parties* who took the trouble to examine the Master's file (R. 91).

The *three-page* application for instructions was not filed according to their schedule until an additional 4½ hours were spent on October 2, 1939, in further conferences. The drafting of the order of reference, consisting of a few lines, took them 3¼ hours and the "study" of the Special Master's order, setting the case for a hearing (R.

* This Exhibit was omitted from the printed record by the order of the court.

11) together with other schedule conferences, *took 7 hours.* An additional 7 hours is scheduled for "attendance" at the hearing on October 12, 1939, and "conferences". Further "conferences" were scheduled (R. 12) on October 13 and 16, 1939, for 2¼ hours. Additional "researches" and "conferences" appear in the schedule (R. 12-13) on October 17, 18, 19, 20, 21, 23, 24, 25, 26, 30, and 31, 1939, for 5 hours, 3¾ hours, 7½ hours, 6 hours, 3¾ hours, 8 hours, 7 hours, 2¾ hours, 5 hours, ¾ of an hour and 1 hour, *involving the same subject matter,* and 1¼ hour was devoted on November 2, 1939, to a "study" of the petition filed by Meyer Abrams in Indiana against Ball to which the Debtor was not even a party.

On February 20, 1940, (R. 14), they "studied" the opinion of Judge Baltzell in the Gochenour suit for 1¼ hours and examined on April 2, 1940, the Master's report recommending the dismissal of the application for instructions. They spent 1¾ hours in preparing the order of dismissal on May 23, 1940; ½ hour *for obtaining the approval of Mr. Kellogg to such order on May* 24, 1940. 3 hours were spent with the deputy clerk concerning the order of dismissal on May 27, 1940. Further "conferences" were scheduled (R. 14-15) on October 9, 22, November 4, 8, 9, 11, 25, December 3, 6, 10, 17, 18, and 23, 1940, relating to the Ball suits *after the dismissal of their petition for instructions.*

From January 8, 1941, to April 30, 1941, after their application *had been dismissed,* and there was *no order retaining them as counsel or authorizing them to do anything as to Ball* they again held conferences (R. 15-19) on January 8, 14, 15, 23, 24, 27, 28, 29, February 1, 3, 4, 14, 27, 28, March 6, 28, April 11, 14, 15, 16, 18, 22, 23, 24, 25, 26, 28, 29 and 30, 1941. The subject matter of these

conferences related to "possible settlements" of the Ball suit when they had *no suit on file,* when their petition for instructions *had been dismissed.** This even included a "conference" for the entry of the order *on the mandate of the court* reversing the decision below in the Howe suit and the time spent to obtain *their own* appointment as Special Counsel.

(1) There was no showing why it was necessary to have three attorneys.

No evidence was offered by them as to why it was necessary for three firms of lawyers to participate in the conferences, why it was necessary to have so many conferences, why it was necessary to duplicate these "researches." All that the Master and the Court had before them were the *blank schedules.* The rule as to the "burden" and the necessity to "clearly point out a substantially definite accomplishment," which the Master invoked against the Petitioners (R. 72), was not applied against the "appointees" of the court. *They acted then without authority, without any appointment.* The burden to show that they were appointed in compliance with General Order 44 was on them. They also failed to meet the burden to show why it was necessary for the multiplication of the legal talent (*Woods* v. *City Nat. Bank,* 312 U. S. 262).

All of their work which appears in their schedule from November 22, 1938, to April 30, 1941, led to no results, did not in any way benefit the estate and there is, therefore, no theory of law on which they may be compensated for such service.

If it be true, as the Master stated in considering the application of the Petitioners that the Howe and Gochenour suits were of no benefit to the Estate, then all of the time which Leckie, Fogg and Sharp devoted to the Howe

* There is nothing in the record to explain why Ball should have conferred with the appointees of the court prior to their appointment on a settlement of a claim, when no such suit was even pending, except the suit commenced by the petitioners.

and Gochenour suits produced no results and they as "volunteers" cannot recover anything for their services, according to the rule applied by the Master against Petitioners (R. 72) that "Volunteers of unauthorized and useless services cannot be rewarded," and adopted by the Court of Appeals.

(2) The facts and the theories were taken from petitioners' complaints.

In order to justify their fees, respondents testified that the theories which Petitioners advanced as a basis for the recovery against Ball are completely different from the theory upon which they obtained the recovery. Their main contention is that Petitioners' theory was based on "fraud" and "conspiracy" while theirs was based on a "violation of the fiduciary duty" or a "constructive trust". The Judge sustained the contention (R. 97). The Exhibits speak for themselves and tend to refute the contention.

The complaint in the Howe case (Exhibit "A"; p. 25)* alleged (par. 11, p. 30) that "notwithstanding the *fiduciary* relationship of the individual defendants and their associates, as officers and directors of the said Cleveland Terminals Building Company, and in total *disregard of their* duties toward plaintiff and all creditors * * * and notwithstanding the knowledge on the part of the said Midamerica corporation of the insolvency" of the subsidiary debtor and of the "*relationship, obligations, and duties of the directors*" of the subsidiary debtor, no notice was given of the scheduled sale and that they acquired the available property for themselves, and by reason thereof they were liable "for all profits which accrued as a result of the purchase of the said collateral in the manner aforesaid." In appellants' suit against Ball

* This Exhibit was omitted from the printed record. It appears in the record in Case 872, 313 U. S. 566.

(Exh. "B"; p. 1)*, it was specifically stated that the action was brought (p. 2) "on behalf of all of the creditors of the said Terminal Company *as a class.*" It was alleged (par. 6) that because of the insolvency of the corporation in August 1935, they, the officers, "*became trustees for the benefit of the general creditors*" and "it became their duty to exert every effort for the benefit of the general creditors and to notify them of the true conditions so that they might protect their interests, yet *in violation of their duty* and for the purpose of defrauding the creditors and benefiting themselves," they conspired with Ball and others to acquire the collateral at a "grossly inadequate consideration." It was also alleged (par. 10) that by reason that the directors and officers "*became trustees for the property*" and due to the fact that Ball acquired the property with notice of such facts, and (p. 7) by reason of the fact that Midamerica distributed the profits to Ball, the assets were "*charged and impressed with a trust*" and "Ball" should be required to account to the trust estate. It is apparent from the foregoing that the contention that the suits commenced by petitioners were on a different theory, is without any basis whatsoever.

The contention that Petitioners' suit was based upon "conspiracy" and that their suit was *not based on conspiracy* is refuted by *their own complaint* which used the term "*confederated*" (Ex. "7", Par. 12).

In opposing the motion to dismiss their suit in Indianapolis, Respondents urged (Exh. 7, p. 3) that the Indiana defendants "participated" in a "scheme" in which the Van Sweringens "*were active participants and confederates*" and "the entire cycle of these transactions became *tainted* with violations of trust duties" and im-

* This is the printed record in Case 872, 313 U. S. 566.

pressed "a trust upon said assets", which are the very allegations of the "Howe and Gochenour suits".

Special Counsel charged in paragraph 11 of their complaint the "device" and "scheme" for the "sale" and "purchase" by the fiduciaries for their own "benefit" to the "detriment" of the creditors.

The *hairline* distinction that they make between a suit *for the violation of trust* or breach of duty, and a suit *founded on fraud on the beneficiaries,* and the labeling of the offense is not the important part. *Fraud is an essential element of a "constructive trust" and in the absence of fraud there can be no constructive trust* (*New Mexico Potash C. & Co.* v. *Independent Potash C. & Co.,* 115 F. (2) 544, 547); *Re*: *Mountain State Power Co.,* 118 F. (2) 405, 407; *Strates* v. *Dimotsis,* 110 F. (2) 374, 376. Anyone reading the Howe and the Gochenour complaints (Ex. "B", pp. 1-8, 19-24), and comparing them with the complaint of Special Counsel (Ex. "7")* can come to no other conclusion than that the complaints as pleaded by petitioners were all-inclusive, and it was not necessary to spend the time in the "conferences", "researches" and in drafting, re-drafting, dictating and re-dictating, as is set forth in the schedule for which compensation was allowed (R. 7-19).

(c) Appointees of a court whose compensation is not contingent may not be compensated on a percentage basis of the amount recovered and their compensation must be confined to the value of the services rendered, and the finding of the Master which was adopted by the court is based on erroneous legal principles and should have been reversed. The Court of Appeals erred when it applied Rule 52 in the absence of a foundation for the findings.

The Judge justified the allowance of the $65,000 on the ground that it was "not quite 12% of the amount of the

* Omitted from printed record by order of the Court.

settlement" (R. 99). This was not a proper test to "appointees of the court" who were *not appointed on a contingent basis* and they were entitled to their compensation whether they succeeded or not.

The case was not tried but was compromised on the pleadings. The work was not difficult because the facts, the evidence, and the entire cause of action was pleaded in the Howe and Gochenour suits. It was clearly set forth in the facts which the petitioners prepared and submitted to all attorneys of record as found by the Court of Appeals (R. 104), contrary to the conclusion of the Judge (R. 96-97). It is *conceded* by the opinion (R. 105) that all of the legal principles and factual matters were disposed of and settled in the two appeals (118 F. (2) 89; 119 F. (2) 231) which was *prior* to the order of May 1, 1941, appointing the respondents as counsel.

In denying any compensation to petitioners, the Judge emphasized the fact (R. 94) that they had previously filed a petition for $172,200.00 and were allowed $18,000.00 and he thought that this was a "generous allowance". He did not refer to the *actual allowance* to the "Appointees" of the Court on the previous application. They were allowed under one phase of their work $32,500, and a second phase, $12,500, on the third application $25,000, on the fourth application $35,000, on the fifth application $27,000, making a total of $132,500. The Court of Appeals also referred to the allowance of $18,000 to the petitioners and was silent on the allowance of the $132,500 to the Appointees of the Court.*

Services of the "Appointees of a Court" should be "closely scrutinized" by the "debtor", the "creditors" and by "the Court" (*Re National Accessories, Inc.,* 13

* See Exhibit M, pp. 170-173, 176, being the printed record in Case 415,, 320 U. S. 566.

F. Supp. 278, 281). In this case *there was no debt* contest the fees of the respondent as they were its ' ervisors''. Petitioner Gochenour was the only pers contest it, and his attorneys, the other petitioners, s not be penalized for performing their duty.

There was no evidence on the part of the appoi of the court as to any of the elements which are esse for the allowance of fees. They did not testify as t difficulty of the legal questions, the necessity and division of time between the three sets of attorneys clusive of the attorney in Indiana. The decision of Court (*In re Gilbert,* 276 U. S. 294) ''that the judg the Court in fixing allowances for services of court of should be most careful'' was completely ignored.

The Sixth Circuit itself announced the principle compensation to officers of a court who do not work contingent basis should be less than compensation t torneys who work on a contingency basis (*Re Detroi Bridge Co.,* 111 F. (2) 235, 251). In the instant cas Appointees did not work on a contingent basis and is therefore *no foundation* for the allowance of $6 The weight usually given to the findings of a Mast a Court is inapplicable to questions involving comp tion of attorneys. (*Columbia Life Insurance Co.* v. *K* 138 App. (2d) 382, 385.)

III.

The recovery of the $550,000 fund was the direct res the services performed by petitioners in the Howe Gochenour suits and in the petition for clarific which was permitted to stand as a petition for ins tions on the debtor to either sue or to permit petiti to sue in its name.

Prior to the decision of March 3, 1941 (118 F. (2d no action was pending against Ball. The Debtor's '' warm'' petition for instructions *was dismissed.* In

decision the court summarized the facts leading to the purchase by Midamerica for $318,000 collateral, then valued at $6,805,800 It referred to the filing of the Howe suit on September 11, 1939, which sought to recover the profits from Midamerica and its stockholders and which asked for leave to join the Debtor as a party, and to the answer of Debtor that the cause of action did not offer sufficient prospects for recovery but that it did not object to be joined as a nominal party. The court referred to the Master's recommendation that the Debtor should not be joined as a party because it was not alleged nor proved that it was a proper, necessary, or indispensable party, and that the Judge confirmed the recommendation on November 10, 1939. It stated that on October 11, 1939, petitioners commenced the suit against Ball which resulted in its dismissal by the Indiana District Court on the ground that the action belonged to the Debtor, and that on February 27, 1940, petitioners filed their petition to clarify or vacate the order of November 10, 1939, or in the alternative, that petitioners be permitted to prosecute these actions in the name of the Debtor; that Debtor filed on October 3, 1939, a petition for instructions and the Master recommended that the petition be dismissed, without prejudice, and that his report was approved on May 23, 1940. After stating these facts, the court said:

> "It is not the purpose of the Act to furnish immunity to wrong doing by corporate officers. On the contrary it is the plain duty of the court to direct the investigation of all substantial allegations of mismanagement or fraud. * * * *On the face of the information in the record there are reasonable grounds to believe that the officers of the Subsidiary-Debtor through their control, have improperly acquired its assets, and by reason thereof, have become indebted to the corporation to the extent of the profit they have realized by reason of their misconduct.*"

The court concluded:

> "While the petitions filed by appellants were not filed on behalf of the Subsidiary-Debtor, *nevertheless they will be treated as presenting sufficient facts to require the court to appoint an Examiner,* and if facts are produced upon a hearing which convince the court that suit should be prosecuted for the benefit of the Subsidiary-Debtor, against officers, stockholders and directors of the Midamerica Corporation, *an order will be entered authorizing the subsidiary debtor to prosecute the suit or if the court deems proper it may give appellants, as creditors of subsidiary-debtor the right to institute suit in its name* after indemnifying it against costs." (Emphasis ours.)

The mandate of the court was subsequently issued and petitioners conferred with Leckie, Fogg and Sharp on the draft of the order under the mandate. On April 23, 1941, there was a "conference" between Leckie, Fogg and Kellogg *concerning the mandate of the court in the Howe case* (R. 17). This resulted in further "conferences" among themselves, so that prior to the entry of the order on the mandate, they obtained, *ex parte,* on May 1, 1941 (R. 39-40), the authority to institute the suit and to appoint themselves as Special Counsel. After they succeeded in their efforts they approved the form of this order on May 12, 1941, which excluded the action against Ball because of the previous order of May 1, 1941 (R. 41). They claimed, and the Master and Judge sustained them, that this sudden change in their attitude to commence the action, without even awaiting the entry of the order on the mandate, was due to the decision of the court in affirming the order on the objections to the claims of Midamerica (119 F. (2) 231) and not to the decision of the court which *directly involved the question whether suit against Ball should be commenced* (118 F. (2) 89).

(a) The recovery of the fund resulted from petitioners' efforts.

Leckie and Fogg who claimed by their schedule to have conceived the cause of action on November 22, 1938, *did nothing for a whole year* with the cause of action (R. 7). Their next "research" was on August 23, 1939. They *became busy* in holding conferences *daily* for hours and hours *after* September 11, 1939, when the Howe suit was filed. They only devoted prior thereto 16 hours from November 22, 1938 to September 10, 1939, but after the filing of the Howe suit they spent most of their time in daily conferences (R. 8-19).

The Howe suit and the opinion of the court in that appeal forced them to act. They realized that creditors were pressing for action; they felt uneasy by the *admonitions* of the court and held "conferences".

The attitude of the Master to the petitioners appears from a cursory examination of the proceedings had before him and the treatment that he accorded to the "appointees" of the Court. He did not interrupt Mr. Sharp in his long narrative statement, except to help him out as to a date (R. 25-28), but he interrupted Mr. Abrams on every important issue in the case and even took the part of a witness in an attempt to contradict the testimony (R. 51, 52, 54, 55, 57).

(b) The record contradicts the statement of the judge.

The statement of the District Judge concerning his appointees and of his relations to the Petitioners speaks for itself. He stated that the action taken by the Petitioners "hindered" and "delayed" the prosecution of the suit against Ball on the part of his appointees (R. 95). How these suits "hindered" and "delayed" the

prosecution of the suit against Ball was not explained in his opinion. When these suits were filed, *no action was even pending,* and the Appointees had not yet received their appointment. The attitude of the Master to the Petitioners appears from his reference to the reversal of his recommendation and to the reversal of the order of the Judge (R. 71). The attitude of the Judge to his Appointees appears from his memorandum (R. 95 where he took all responsibility on himself to relieve his Appointees from any criticism.

The situation here is similar to the situation in *Mecartney* v. *Guardian Trust Co.,* 280 Fed. 64. There the intervention was opposed by all parties and a fund of $700,000.00 was recovered. The intervenor was allowed $15,000.00 instead of $75,000.00 and in increasing the allowance the Court said (page 68):

> "It is *apparent* from the remarks of counsel for the Trust Company above quoted that the opposition of counsel and of the officers of the Trust Company in charge of the litigation to the application of the stockholders to intervene and present the issue raised in their petition was *due to ill will towards claimant and prejudice against any suggestion which he might make.* It is not necessary to go far to find the cause."

The Court also said (pp. 70-71):

> *"The failure of the officers and attorneys of the Trust Company to present the issue raised by claimant after their attention had been called to it was not a simple error of judgment but was so palpably the result of prejudice against claimant and a desire to depreciate him and the value of his services* while counsel for the Trust Company that in our judgment it amounted to a breach of duty. It is highly probable that the Southern Company would *have escaped liability altogether if the issue had not been raised by claimant* in behalf of the intervening stockholders at the time and in the manner it was raised." (Italics ours).

(c) The rights of the creditors were protected by the petitioners.

The cause of action existed since September 30, 1935. The Statute of Limitations as to the Ohio defendants expired September 30, 1939. Although the "appointees" of the court claimed to have *conceived* the action against Midamerica on November 22, 1938, *they took no steps to prevent the distribution of its assets and did not even advise the court the results of their "researches", and "conferences",* nor did they communicate with any of the parties or even with "Mr. Sharp" the "appointee". Petitioners filed the Howe suit against Midamerica and its officers on September 11, 1939. The Master *found* in a previous report (R. 45) that the "Howe" suit was *"evidently filed to protect for creditors of subsidiary-debtor, their rights against Midamerica Corporation in case subsidiary-debtor abandoned, or showed no inclination to prosecute proper actions arising out of Midamerica Corporation transactions and actions."* The attention of the Debtor was *called to the fact that it was also necessary to file a suit in Indiana* against Ball and others who were non-residents in Ohio prior to the time when they filed the application for instructions. This was alleged in the petition for compensation (R. 20, par. 4), the truth of the allegations were testified to (R. 47-48) and *no evidence was offered tending to contradict it. Thereafter,* on October 3, 1939, Leckie and Fogg filed a petition in the name of the Debtor seeking instruction as to whether to start the suit. They made no recommendation however, to file the suit. They did not inform the Court in their application that they made a study of the facts and of the Statute of Limitations which would expire in Ohio on September 30, 1939 and in Indiana on September 30, 1941 and that they discovered all of the facts on November 22, 1938, nor did they

consider a question of *laches* which might have been interposed successfully by a further delay which defense is not governed by the Statute of Limitations. (*York* v. *Guaranty Trust Co.*, 143 F. (2) 503, 521.)

Petitioners filed their suit on October 11, 1939, in Indiana prior to the intervention of the Statute of Limitations. Respondents stood by and *permitted the dismissal of their petition for instructions* on May 1, 1940, and did not commence the action until *after* the rendition of the opinion on March 3, 1941 in petitioners' appeal which treated their petition in the nature of an intervening petition to *compel* the prosecution of the actions.* *The preservation of the cause of action* leading to the recovery of the $550,000 *was therefore the direct result of the decision of the court on petitioners' appeal.*

The contention that Respondents filed their Indiana suit not as a result of the opinion of March 3, 1941, but because of the affirmance of the orders on the claims of Midamerica on April 16, 1941 for the reason that they waited for a "*final*" adjudication on the claim is *unsound* because the court might not have rendered its opinion until after September 30, 1941, and in such event the entire cause of action would have failed because of the intervention of the Statute of Limitations in Indiana. They had no guarantee that the case would be decided sooner. They *risked* the action by the "delay" to be defeated by a *defense of laches,* which is not governed by the Statute. *Holman* v. *Gulf Refinery Co.*, 76 F. (1) 94, 99. This rule was applicable in Indiana and they risked the entire cause of action by the delay. (*Porter* v. *Hyne*, 7th Cir., 213 F. 154, certiorari denied 238 U. S. 620.) Besides, *the decision was not final* until the denial of the rehearing and the writ of certiorari on October 27, 1941

* Their schedule showed that they conferred between May 1, 1940 and May 1, 1941, concerning the settlement of the claim against Ball (R. 14-15), this being at the time when they had no action pending against Ball and prior to their appointment.

(314 U. S. 671). They *hastened* to obtain leave of court to file the suit on May 1, 1941, without notice, before the rehearing was disposed of, *and after they conferred with themselves on April* 23, 1941, *on the entry of the order under the mandate* pursuant to the opinion of March 3, 1941, with the result that they obtained their appointment on May 1, 1941, and the direction to file suit *ex parte* and were able to state thereafter in the order on the mandate that *it was no longer necessary, as it was already done.* If they intended to sue "Ball" and merely waited for the affirmance of the order on the objections to the claim, they would have urged that the ruling on the petition be *continued* until after the disposition of the appeal on the Midamerica claim.

(d) The record does not support the timing of the suit by the Judge.

The statement of the Judge in his memorandum (R. 95) that he was fully advised of the facts and "any seeming delay was the result of the court's own action" in determining *"the timing of the suit"* was evidently to justify the allowance of the $65,000 to his "appointees" and to deny any compensation to petitioners. If the Judge was "timing" the filing of the suit then why did he refer the application for instructions to the Special Master? He did not dismiss the petition because of *his "timing of the suit"* but because of the *Master's recommendation.* There is nothing in the record to sustain the statement that the *"timing" was discussed with the court or that the court "of its own action" determined the "timing" when to sue.* A court has no right to make statements on matters which are not supported by the record. Their schedule (R. 7-19) refutes any "timing" by the Judge.

The statement in the memorandum (R. 95) that "the charge of bad faith in respect of the court's appointed officers" is not only without any foundation but "tends to reflect on the court's own action in advising its own appointees that the time was not yet ripe for filing"* shows the attitude of the Judge toward Petitioners in denying any compensation to them and its attitude to its "appointees" in allowing them $65,000. Even if the court gave them *ex parte* advice it is not proper to consider it on objections to a Master's report when there is no proof to sustain such *ex parte* advice.

(e) The first step to recover the fund was taken by petitioners.

The Master states (R. 65) in his report that the *"first"* and *"concrete step"* for the foundation of the action *was the filing of the objections* to the Midamerica claims. He credited "Special Counsel" with this *first step* while in fact the first step was *taken by petitioners* when they filed their objections on August 17, 1937. Mr. Sharp who was the appointee of the Master *thereafter* adopted "substantially" the objections as found by the Special Master in his report of October 25, 1938 (R. 46).

(f) Petitioners made all facts available to respondents.

The facts for the "successful attack" were *discovered, compiled, analyzed,* and *made available* to "Special Counsel" *before* their appointment, by petitioners' Exhibit "H" which the Master failed to consider or to mention in his report. Under Point II (R. 60) subdivision (a): *"Plans to sell the collateral and acquire same for the personal interest of the Van Sweringens"* the details are shown. Under subdivision (c) entitled: *"Plans laid in the dark to purchase the property ostensibly in the name*

* We know of no case where a court has taken upon itself the duties and responsibilities of "timing" a suit, and to delay the action for a period of six years.

of Midamerica Corporation but in reality for Van Sweringens'' the story was presented in detail under subdivisions (1), (2), (3), (4), and (5) (R. 61-63). Subdivision (a) under the heading of *''Profit of Midamerica as the result of alleged purchase''* shows (R. 63) the huge profit made by Midamerica as a result of the purchase and all the securities were listed there. *The entire story,* in chronological order *was there told and made available* (R. 63-64).

In speaking of this exhibit the Judge said (R. 96), ''the matter contained in Exhibit 'H' was information largely obtained from Congressional hearings, and like other facts about the Van Sweringen enterprises and the Midamerica purchases from Morgan & Company, were fairly well advertised and certainly as open to the public knowledge as to these objectors.'' If this be true then it must have been known to the Court, to the Special Master, as well as to its ''appointees'' in 1936. Why was there no action taken by injunctive relief to prevent the distribution of the profits by Midamerica to Indiana residents which would avoid suing in a foreign state? Why was the ''timing'' delayed until *after* the distribution which compelled the court to dismiss the petition for instructions on May 1, 1940, because of the representation that it would require $25,000, to sue in a foreign court when this could have been prevented by the mere issuance of a restraining order? The answer is plain. *It is not sufficient that news items are published in newspapers.* One must be interested in a case to study the facts, to analyze them, and to apply the legal applicable principles to such facts, and to bring them to the attention of the court. These facts were compiled, analyzed, and brought to the attention of the court as well as all parties of record by

Exhibit "H" when the Senate Reports were in typewritten form before they were printed and circulated to the public. It required a great deal of study to compile and analyze these facts as testified to by Mr. Abrams (R. 48).

The fallacy of the statement that all of the facts pertaining to the Van Sweringen deals were known to the appointees of the court from the "newspaper clippings" that appeared in 1936 (which they introduced in evidence, over objection, as Exhibit "9") is best demonstrated by the fact that while Fogg and Leckie were appointed as "Trustees" of the Van Sweringen Corporation and as "supervisors" who, according to them, were charged with every duty and responsibility, they did not take any action to protect the noteholders of the $30,000,000 note issue which the Van Sweringen Corporation floated in the market and which would have been almost a complete loss if it had not been for the action taken by petitioner Abrams to protect the interest of the noteholders in a *class suit* which he filed in New York at about the same time that he filed his suit against Midamerica and the Ball Foundation. (*York* v. *Guaranty Trust Company of New York,* 143 F. (2d) 503.)* This case completely demonstrates the falsity of the contention that as a result of the "newspaper clippings" and as a result of "reports" that the Special Master received, they, the appointees of the court, were wholly familiar with all of the existing causes of action.

* The $30,000,000 notes are the same notes on which the Midamerica filed its claim for $13,784,000 and which the court allowed only to the extent of $2.00 (**Re Cleveland Terminals Building Company,** 119 F. (2) 231) on the objections of these petitioners. The subject matter was also involved in petitioners' appeal from overruling objections to the Morgan claims in which opinion the court found that it was tinged with fraud to the extent of over $5,000,000 (117 F. (2) 278).

The Judge stated in his memorandum (R. 97) that its "appointees" had testified in open court that they never saw Exhibit "H" nor did they see any similar document that resembled it before the hearing before the Special Master on the application for fees.

The evidence was that this document containing a synopsis of all the facts upon which the cause of action was based was filed with the Special Master as an Exhibit in 1937 (R. 89-91) and other attorneys testified that *they saw and examined the exhibit.* In the face of such evidence, the statement of the Judge that there was no evidence to contradict the statement of his Appointees, is unexplainable. Their failure to see the exhibit merely demonstrates their lack of diligence or negligence, and they cannot claim compensation for failure to perform their duties. The Court of Appeals did not agree with the Judge on this point because it found that this exhibit was duly prepared and submitted to all attorneys and filed of record (R. 104). In addition to the synopsis of the facts contained in that document, the entire cause of action was set forth in the complaints filed by the petitioners in Ohio and Indiana, which complaints were carefully examined by them as it appears from their schedule. These complaints must have been of benefit to them, for otherwise the Master would not have recommended compensation for services spent in the examination thereof.

The Master's Report was based on his assertion (R. 65) that the Appointees of the Court recovered the $550,000 by progressive methods, the first step being their objections to the claims of Midamerica. This statement was rejected by the Court of Appeals (R. 104, 105), and yet it approved the order of the District Court which was based on the unwarranted statement of the Master.

There appears in the record the order of the Special Master of October 25, 1938. There, the Master stated (R. 46):

> "A. B. Gochenour and certain other creditors of subsidiary-debtor filed joint objections on the allowance of the claim of Midamerica * * * . At the time of the filing of said objections, the claim had been admitted as true and valid by the subsidiary-debtor. * * *
>
> Thereafter * * * Special Counsel was appointed for subsidiary-debtor * * * subsidiary-debtor, thereafter, through said Special Counsel filed objections to the claim of Midamerica Corporation, the objections of subsidiary-debtor being *similar* to those raised by Gochenour, *et al.*"

IV.

The findings of the Master and the conclusions of the court that petitioners did not contribute anything to the recovery of the fund is contrary to the undisputed facts.

Not only is the finding of the Master that petitioners did not contribute anything to the recovery of the fund contradicted by petitioners' evidence and by the exhibits but it is also refuted by the testimony of Mr. Sharp to whom the Master gave credit for the recovery of the fund together with his associates as "Special Counsel".

(a) Respondents' evidence showed that they made use of the facts and theories which petitioners made available to them.

Respondent Sharp testified (R. 34):

> "And I suppose you want me to say that in addition to that, the ones that I mentioned before, we examined the pleadings and papers and records in connection with some litigation that you had started on behalf of clients that you represented, and we did examine those among others."

When asked to be more specific, he said (R. 34):

> "you objected to the claims of J. P. Morgan and Company, and had extensive proceedings before the Special Master and the court and the Circuit Court of Appeals in which you attempted to establish the position that the J. P. Morgan sale had been a fraudulent sale, the result of a conspiracy, and you went over a lot of ground in connection with that, and we looked into the things that you had set up there and examined the matters that had been brought out, and among the other things we did in preparation for handling this case we tried not to miss any bets or fail to follow any leads that might lead to something that would be of value in discharging the obligation that was placed upon us as the appointees of the court who had the responsibility of handling this matter."

He further said (R. 35):

> "there was a case filed by you and your associates on behalf of Howe and others * * * against Midamerica Corporation and certain Ohio defendants on September 11, 1939."

He was further asked whether it was true that the subject matter of the suit in the Howe case involved practically the same subject matter as was involved in the subsequent litigation against the Ohio defendants and he answered (R. 35): "Well, in part."

With his own order staring him in the face, the Master did not hesitate to say in his present report (p. 2):

> "This came (the $550,000 fund) by careful and progressive methods, the first concrete step was the successful attack by appellants, (special counsel) upon claims filed for allowance, by Midamerica Corporation against the Estate of the Debtor and Subsidiary-Debtor. With the first step successful, a strong foundation was laid for the basis of the recovery from the Ball interests and the property of Midamerica Corporation."

The Special Master deliberately *stripped the petitioners of these first steps which he said were the foundation for the recovery of the* $550,000 *fund* and gave the *sole* credit to Special Counsel who merely stepped into the shoes of the petitioners *after all the facts were made available to them,* and recommended the allowance to them of the entire fee of $65,000 and "nothing" to petitioners. To sustain such a report was a miscarriage of justice.

(b) The Howe suit in Ohio and the Gochenour suit in Indiana and the appeal resulting in the mandate to appoint an examiner to investigate the causes of action and to direct the subsidiary-debtor to either commence an action in its name or to permit petitioners to proceed with the action in its name resulted in the recovery of the fund and petitioners were entitled to reasonable compensation.

In referring to the Howe suit, the Special Master says in his report (R. 70):

> "Inasmuch as said suit was unproductive of results, and in no way assisted in the recovery of the assets, petitioners' services in connection therewith do not appear compensable."

The Master completely ignored the evidence, as well as his own report of October 6, 1941, which he filed in his role as Examiner. The undenied evidence showed that after the remandment of the case on the appeal from the order of November 10, 1939 (118 Fed. (2d) 89), directing the appointment of the Examiner to investigate the causes of action that the subsidiary-debtor should then proceed and on its failure to do so, appellants might proceed, "special counsel" obtained the order to file their suit without notice to appellants. Mr. Abrams testified (R. 51):

"Prior to the offer of settlement there was pending the Howe suit, which was not dismissed * * *. After the Examiner was appointed under the mandate the question came up what should be done with the Howe suit, whether it should be dismissed or whether the case should proceed. We had several conferences before the Special Master. The question whether the Howe suit should remain or be dismissed depended upon the question whether the Statute of Limitations may be urged and whether the Statute of Limitations was applicable to this kind of claim due to the fact that the subsidiary-debtor was in bankruptcy under Section 77B and there was the contention made that the 77B proceedings stayed the toll of the Statute of Limitations."

Mr. Abrams further testified that the Master in his role as Examiner asked for briefs on this point and a brief was submitted which called attention to a recent decision of the United States Circuit Court of Appeals for the Seventh Circuit* holding that the Statute of Limitations was not stayed during the pendency of the 77B proceedings. The Special Master interrupted and said (R. 51):

"My recollection, if I may interrupt, was that some informal memorandum was prepared by Mr. Abrams and sent down. I think it was something in connection with the Howe suit."

The Special Master also stated:

"I think at that time you claimed, Mr. Abrams, the suit filed by the subsidiary-debtor against Ball would be defeated on account of the Statute of Limitations. Of course that didn't happen."**

Mr. Abrams further testified (R. 51):

"* * * Thereafter another conference was held with the Special Master where it was disclosed that no plea to the Statute of Limitations was filed to the action

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* Narin v. McCarthy, 120 F. (2) 910.

** It "did not happen" because there was then pending the Howe suit, so that the defense would not have been available.

> and in the conference it was then determined that inasmuch as there was no plea to the Statute of Limitations filed the action of the Howe suit was no longer of any importance, and it was, therefore, agreed by all parties that the Howe suit be dismissed and that the Master and the special Examiner shall file a report with the Court that the Howe suit be dismissed as it was no longer necessary, and the Howe suit was dismissed."

The report of the Special Master concerning his recommendation to dismiss the Howe suit was introduced in evidence by the debtor as Exhibit 20. In that report the Master *then* stated (R. 45):

> "The Howe case, aforesaid, was evidently filed to protect, for creditors of subsidiary-debtor, their rights against Midamerica Corporation in case subsidiary-debtor abandoned or showed no inclination to prosecute, proper actions arising out of Midamerica Corporation transactions and actions."

He then referred in his report to the fact that after the filing of the mandate an order was entered on May 1, 1941, permitting Special Counsel to institute suit against Ball Foundation and stated in his report:

> "Your Examiner has thoroughly discussed with counsel for Subsidiary-Debtor, and with counsel for plaintiffs in the Howe case, the facts, the law and the practicabilities of the situation and counsel appear satisfied that a further prosecution of the Howe case, in view of the pending case against Ball and others in the Indiana court, cannot be productive of any substantial results, and that it is to the best interests of the estate that the Howe case be dismissed."

Compare the foregoing undenied testimony and the Master's report of October 6, 1941, in connection with the Howe suit wherein he stated that the suit was kept pending for the protection of the rights of creditors with his present report that the Howe suit was unproductive

of results and this Court will *visualize the unfairness and attitude of the Master toward appellants.*

In the face of such a record the Judge stated:

> "Nor do I think that there was anything in the Howe suit filed in August, 1939 (it was filed September 11, 1939), which contributed in theory or principle in respect of the debtor's claim against Ball which was not already understood by the court as well as by his special counsel."*

In speaking of the opinion which reversed his order on the motion to vacate or clarify his order of November 10, 1939, the Judge said (R. 95):

> "Neither in the so-called Howe suit, nor in other proceedings instituted by these objectors, were any beneficial results produced that could be held to have brought about the ultimate Ball suit which resulted in the recovery settlement. The plain fact is that the so-called clarification proceedings filed and prosecuted by these petitioners had a tendency to impair the work then in progress on the Ball suit later brought by the Court's special counsel, and the suit by Gochenour against Ball in Indiana, dismissed by that court, might well have hindered or delayed the success of the Ball suit upon which recovery later was had."

These statements which are not based on competent evidence but on inferences and deductions from the documentary proof were not justified, and Court of Appeals was not bound by Rule 52 to accept such conclusions.

V.

The allowance of compensation for the recovery of funds is governed by rules of equity and is not confined to statutory provisions.

The allowance of fees in the instant case should be governed by rules of equity because the fund was recovered as the result of an equity suit.

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* If this was "already understood by the Court as well as by his special counsel", it would not have been necessary to refer the question whether to permit the Debtor to be joined as party to the Howe suit to a Special Master.

A court of bankruptcy is, in the final analysis, a court of equity and is governed by equitable principles (*re Commonwealth Light & Power Co.,* 141 F. (2) 734). This is particularly true in this case where the recovery was obtained from a plenary suit. The rule of law announced in *Sprague* v. *Ticonic Bank,* 307 U. S. 161, should be the guiding spirit. There the court said (p. 166):

> "Plainly the *foundation for the historic practice* of granting reimbursement for the costs of litigation other than the conventional taxable costs *is part of the original authority of the chancellor to do equity in a particular situation.*"

The opinion must be in accord with our view that equitable principles are applicable in bankruptcy, having cited *Trustees* v. *Greenough,* 105 U. S. 527, *which is not a bankruptcy case* but an equity case in support of the allowance to Respondents of compensation for the period prior to May 1, 1941. This decision should be equally applicable in allowing compensation to petitioners on equitable principles, particularly in view of the fact that General Order 44 is applicable *only* to the respondents and *not* to the petitioners who never claimed to act as the attorneys for the subsidiary debtor. It is, however, clearly applicable to the petitioners who represented the *creditors* and whose efforts contributed to the recovery of the fund. In the *Greenough* case, *supra,* the court said (p. 534):

> "The rule that a party who recovers a fund for the common benefit of creditors is entitled to have his costs and expenses paid out of the fund, *prevails in bankruptcy cases*".

The Court completely overlooked this rule which is applicable here.

VI.

General Order 44 in bankruptcy was improperly invoked against petitioners who did not claim to represent a trustee, a receiver or a debtor but represented creditors.

The services of the Petitioners were performed in reorganization proceedings under Section 77B and Chapter X of the Bankruptcy Act and the services were incidental to the reorganization proceedings.

(a) Petitioners performed their services in connection with the reorganization plans and no order was required for such purposes.

The Court of Appeals entirely overlooked the fact that the "chose in action"—the cause against Ball—*was made part of the reorganization plan by amendment to the plan of October* 15, 1940. The court entered an order on July 29, 1941, amending the plan of October 15, 1940 (Exh. "M", p. 13). In this order, the court approved the report of the Special Master of June 11, 1941, who recommended that the plan of October 15, 1940, be modified so that there would be transferred to the examiner appointed pursuant to the mandate of this Court "any and all other claims, choses in action, causes of action or actions, belonging to the Cleveland Terminals Building Company or its estate, of whatever kind or nature". The order of the court of July 29, 1941, *approved this recommendation and provided for the transfer to the examiner for the benefit of the estate* in connection with the reorganization plan *"all other claims, choses in action, cause of action or actions, belonging to the Cleveland Terminals Building Company"*. This amendment included the causes of action against Midamerica and Ball, upon which the recovery was had and upon which reasonable compensation is being requested of this Court.

The Court of Appeals affirmed the order below against Petitioners because of the application of General Order 44, which applies to attorneys for a receiver, trustee or debtor in possession (*Re Siegel,* 40 F. Supp. 67, 68). Petitioners never represented such parties but represented "creditors". They asked for compensation in connection with the reorganization plan. In their original petition for the allowance of compensation they stated in the petition that they did not desire any allowance at that time because the recovery had not yet been had.

(b) No order is necessary when the interest of the trustee is adverse to the interest of the creditors.

The opinion cites *New York Investors, Inc.,* 130 F. (2) 90, on the point that it is necessary to procure a formal authorization of the court to proceed in the name of the trustee or debtor in possession. The court overlooked the *exception* to the rule, decided in that case, *that where the debtor in possession* or the trustee *stands in an adverse position, then no such order is necessary.* In the instant case, the subsidiary debtor *stood in an adverse position* because it was itself a party to the fraud which was committed against the creditors. The subsidiary debtor, prior to the filing of the objections to the Midamerica claim, *had consented to the allowance of the claims because of its adverse position.* Under such circumstances, petitioners had the right to proceed without an order of court as held in the case which the opinion cites.

The above decision is cited in re: *Cook Motors* (52 F. Supp. 107). There the court discussed the question whether under Section 64 (a) of the Bankruptcy Act creditors who took steps to secure assets for the estate without authorization from the court are entitled to the compensation of their attorneys. The court pointed out that ordinarily no compensation can be allowed without

authorization. It also pointed out, however, that where a trustee or *debtor in possession stands in an adverse position,* that there is an *exception to the rule.* The court there said:

> "The reason for the rule is that usually the trustee and his counsel, each of whom has an official appointment, are the proper persons to determine whether a claim is worth prosecuting and to act in the light of their determination. A third person is often merely an officious intermeddler who may have partisan interests and who is quite likely to complicate and make move expensive the administration of the bankrupt's estate. *However, even in some of those circuits where the ordinary rule denies compensation to a volunteer creditor acting without advance authorization, the rule would probably not be applied in a case where a trustee in bankruptcy or his counsel is involved in a conflict of interests. In re New York Investors, Inc.,* 2 Cir., 130 F. 2d 90."

The court further said:

> "Where there is a conflict of interest of this sort and where the trustee in bankruptcy refuses to act, in my opinion the reason for the rule laid down in the case of *In re Eureka Upholstering Co., supra, disappears and the vigilant creditor may recover compensation under Section* 64, *sub. a* (1), even though he failed first to secure authority from the referee."

This court should bear in mind that by its answer to the *Howe* suit, the subsidiary debtor *abandoned* the cause of action against "Midamerica, its officers and assignees," as shown above and therefore, the language in the above case is *apropos.* There the court said:

> "The second part of the inquiry under Section 64, sub. a (1), is whether when, the trustee in bankruptcy having refused to act, a general creditor recovers for distribution among all claimants an asset which another creditor held as partial security for his claim,

that asset can be regarded as having been recovered, in the words of the Statute, 'for the benefit of the estate', or, on the contrary, only for some creditors at the expense of other creditors. In one sense, it is true that the estate itself is not enriched, for the margin between liabilities and assets has not been narrowed by the recovery. And yet, speaking loosely, Congress might correctly use the phrase to describe services which made assets available for general as distinguished from special distribution. Indeed, just such broad usage of the identical phrase appears in the sections governing preferential and fraudulent transfers. Section 60, sub. b. and Sec. 67, sub. a. (3). *Moreover, such broad usage is inconsistent with what appears to be the intent of the section, that anyone who justifiably and successfully acts in the place of the trustee in bankruptcy and not merely for his separate, individual interest should stand in the trustee's shoes for the purpose of recovering his reasonable expenses.* Therefore I am of the opinion that the referee correctly concluded as a matter of law that on his findings the claim of Gar Wood was entitled to priority. *In re Stearns Salt & Lumber Co.,* 6 Cir., 225 F. 1, 6; *In re Phoenix Hotel Co.,* of Lexington, Ky., D. C. E. D. Ky., 20 F. Supp. 240, 242; *In re Gem Stores Co.,* D. C. E. D. Ky., 23 F. Supp. 779."

VII.

The Court of Appeals failed to examine the foundation for the findings on which it affirmed the order below.

In the recent opinion of this Court in *Baumgartner* v. *United States,* 64 S. Ct. 1240, it said that while concurrent findings of two lower courts are persuasive, this does not relieve the reviewing court from the task of examining the *foundation of the findings* on cases brought up on appeal and the foundation of a finding depends on "the nature of the materials" on which the *finding is*

based. The seventh circuit took cognizance of the "admonition" by the court to examine "all foundation for the findings" (*H. Earl Cook* v. *Ball,* Nos. 8432-8433, July, 1944, not yet reported). The Sixth Circuit evidently overlooked it. The Special Master *based his findings on newspaper clippings* which were introduced as debtor's Exhibit 9, which were *clearly incompetent* (*Southern Publ. Co.* v. *Carin,* 144 Fed. 348). The Master also failed to consider Exhibit "H". He based his findings on his conclusions that the primary steps leading to the recovery were the objections which the respondents filed to the Midamerica claims. The trial court disregarded the Master's conclusion that petitioners were volunteers and held that even if they were volunteers, if their efforts contributed to the recovery they would be entitled to compensation. The Court of Appeals neither adopted the Master's report nor did it adopt the conclusions of the Judge, for it held that even if the services did lead to the recovery of the fund, the law prevented the allowance of compensation. This is based on a misconception of the facts and of the applicable principles of law.

The opinion presents an anomalous situation. On the one hand, the opinion states that it is the duty of the court "to avoid double expenses" and on the other hand, it sustained allowances to *three* sets of attorneys covering the period from November 28, 1938 to May 1, 1941, without any order for their appointment and without anything in the record showing why it was necessary to have three sets of attorneys, and in complete violation of General Order 44 which is expressly applicable to the respondents but which was wrongfully applied to the petitioners.

Conclusion.

We have shown that the court clearly erred in allowing $65,000.00 to its "appointees"; that it applied false legal principles in ruling on the objections to the Master's report and that its decree allowing such compensation was clearly erroneous. We have also shown that the court clearly erred in overruling the objections to the Master's report, in recommending no allowance to the petitioners and that the report lacked basic findings, and the recommendations were by a Master who was prejudiced and biased, and that the court failed to make basic findings when it sustained his report which lacked such findings. We have also shown that the decree is in conflict with the decisions of this court and with decisions of other circuits. It follows that the writ should be granted.

Respectfully submitted,

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